(2)

No. 04-1127

IN THE

Supreme Court of the United States

PREMIERE TECHNOLOGIES, INC., N/K/A PREMIERE GLOBAL SERVICES, INC., BOLAND T. JONES, PATRICK G. JONES, GEORGE W. BAKER, SR., and RAYMOND H. PIRTLE,

Petitioners,

v.

APA EXCELSIOR III, L.P., APA EXCELSIOR III OFFSHORE L.P., APA/FOSTIN PENNSYLVANIA VENTURE CAPITAL FUND, CIN VENTURE NOMINEES LIMITED, STUART A. EPSTEIN, and DAVID EPSTEIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER QUESTION PRESENTED

Does a plaintiff that acquires stock pursuant to a registration statement and prospectus filed with the Securities and Exchange Commission to effectuate a public offering in connection with a stock-for-stock merger have standing to pursue claims under Sections 11 and 15 of the Securities Act of 1933, when that plaintiff agreed to vote its shares in favor of the merger prior to the issuance of the registration statement and prospectus, subject to critical conditions precedent to the merger that were not met?

CORPORATE DISCLOSURE STATEMENT

None of the Respondents are held in corporate form.

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STATEMENT OF THE CASE

Introduction

Respondents APA Excelsior III L.P., APA Excelsior III Offshore L.P., APA/Fostin Pennsylvania Venture Capital Fund, CIN Venture Nominees Limited, Stuart A. Epstein, and David Epstein respectfully submit this brief in opposition to the petition for a writ of certiorari (the "Petition") filed by Premiere Technologies, Inc. (n/k/a/ Premiere Global Services, Inc.) ("Premiere"), Boland T. Jones, Patrick G. Jones, George W. Baker, Sr., and Raymond H. Pirtle, Jr.

The decision below involves the fact-specific question whether events that transpired during the negotiation of the subject merger have any impact on plaintiffs' standing to pursue claims under Sections 11 and 15 against defendants when plaintiffs independently acquired stock pursuant to a registration statement and prospectus filed with the Securities and Exchange Commission to effectuate a public offering. Petitioners, for obvious reasons, seek to recast the relevant dispute as one over the applicability of this Court's decision in *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) to plaintiffs' Section 11 claims. Petitioners' effort, however, is a complete red herring because plaintiffs have never disputed that *Gustafson* applies – all of the parties and the Eleventh Circuit agreed on that point.[1] Petitioners' argument, moreover, conveniently ignores that there is no split among the Courts of Appeals on the question of *Gustafson's* applicability, making certiorari inappropriate. Finally, the procedural

1. Plaintiffs' position always has been that *Gustafson* unequivocally establishes their standing in this case, because they purchased their shares in a public offering. App. at 9-12 (citations to "App. at __" refer to the Appendix to the Petition.).

posture of this case also favors denial of the Petition because further proceedings may moot the Petition, and delaying summary judgment and trial risks prejudicing plaintiffs irreparably.

Factual Background

This securities action arises out of a Registration Statement and Prospectus (collectively, the "Registration Statement") that were filed by defendants with the Securities and Exchange Commission ("SEC") on January 28, 1998, in order to consummate a stock-for-stock merger between Premiere and Xpedite Systems, Inc. (the "Merger"). Pl. 56.1, ¶ 79.[2] Discovery has demonstrated that this Registration Statement, pursuant to which plaintiffs and all other Xpedite shareholders acquired their Premiere shares, was riddled with materially false and misleading statements and omissions. *See, e.g.*, Pl. 56.1, ¶¶ 101-137, 147-175, 180-196, 198-218, 221-238.

Prior to, and as an express condition of, the execution of a definitive merger agreement (the "Merger Agreement"), Premiere required plaintiffs, among others, to execute Stockholder Agreements by which plaintiffs granted defendants a proxy to vote their shares in favor of the Merger. The Stockholder Agreements were terminable if the Merger was not consummated for any reason. Pl. 56.1, ¶¶ 47 53, 55 59.

The Merger Agreement was terminable by either party upon the occurrence of numerous conditions, including any breach of warranty or representation by Premiere. Pursuant to the Agreement, Premiere warranted and promised to file a truthful

2. Citations to Pl. 56.1 refer to Plaintiffs' Separate Statement of Material Facts Pursuant to Local Rule 56.1, filed in the District Court on December 4, 2002 [N.D. Ga. Docket No. 163].

Registration Statement with the SEC. Moreover, the Merger Agreement created an affirmative obligation that Premiere notify Xpedite of any Material Adverse Effect to its business from the Agreement's date to the effective date of the Merger. Pl. 56.1, ¶¶ 61, 71.

Many of the facts that plaintiffs allege defendants omitted from the Registration Statement became known to Premiere after the Merger Agreement and Stockholder Agreements were signed.[3] Yet, despite Premiere's express obligation to disclose this information to Xpedite, defendants utterly failed to do so. As a result, on February 27, 1998, a majority of Xpedite and Premiere shareholders, including plaintiffs, voted to approve the Merger, completely unaware of the material misstatements and omissions in the Registration Statement. Following approval, all Xpedite shareholders, including plaintiffs, received 1.165 shares of Premiere common stock in exchange for each share of their Xpedite stock, representing a purported value of $34 per Xpedite share. Pl. 56.1, ¶¶ 88-91.

On June 10, 1998, less than 4 months after Xpedite shareholders approved the Merger, Premiere issued a press release and conducted a conference call disclosing significant adverse information regarding its business. This information represented the ultimate effect of the adverse facts that existed at the time the Registration Statement was disseminated, yet were not disclosed by defendants therein. Pl. 56.1, ¶¶ 239-241, 244. In response to Premiere's June 10, 1998 announcements, Premiere's stock dropped from $14.4375 per share to $10.375 per share, a one-day decline of 28% and a decline of 69% from the $34 per Xpedite share Merger price. Pl. 56.1, ¶ 243.

3. Defendants' summary judgment motion did not pretend that there were no triable issues of fact regarding whether the Registration Statement was materially false and misleading.

In slightly over three months, the value of plaintiffs' Premiere shares declined over $56 million.

Procedural Background

In November 1998, plaintiffs filed suit against Premiere and certain of its officers and directors, alleging breach of contract, negligent misrepresentation, and violations of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, as a result of defendants' material misstatements and omissions contained in the Registration Statement. App. 25-28. The District Court dismissed plaintiffs' breach of contract claims, and their Securities Act claims relating to some (but not all) of the alleged misrepresentations in the Registration Statement. *Id.* at 26-27. After discovery, the District Court granted summary judgment: (1) on plaintiffs' remaining Securities Act claims, holding that plaintiffs lacked standing because they did not acquire their shares pursuant to a public offering; and (2) on plaintiffs' negligent misrepresentation claims, holding that plaintiffs could not establish reasonable reliance on the misrepresentations. *Id.* at 50-51.

On appeal, the Eleventh Circuit reversed the District Court's award of summary judgment on plaintiffs' Section 11 claims, holding that plaintiffs did, in fact, have standing because they "acquire[d] their shares of Premiere pursuant to a Public Offering." *Id.* at 8 . Defendants petitioned the Eleventh Circuit for a partial rehearing, or partial rehearing *en banc*, which petitions were denied. Defendants then petitioned the Eleventh Circuit for a stay pending the filing of their certiorari petition, but were denied. Upon remand, defendants filed a renewed motion for summary judgment. Briefing of that motion is ongoing in the District Court. The Eleventh Circuit affirmed the District Court's dismissal of the negligent misrepresentation claims. *Id.* at 21.

REASONS FOR DENYING THE PETITION

This Petition rests entirely on the suspect claim that certiorari is appropriate to resolve an alleged conflict among lower courts over the applicability of the Supreme Court's decision in *Gustafson* to Section 11 claims. Petitioners' claim is flawed for at least two related reasons.

First, Petitioners' argument is disingenuous because nothing in this case turns on resolution of a non-existent conflict. Respondents' position always has been that *Gustafson* confirms their standing in this case. The Eleventh Circuit agreed, ruling that, even if *Gustafson* applied, Respondents would have standing to pursue their Section 11 claims because they purchased their shares pursuant to a single, integrated offering. App. at 7-10. Thus, even if this Court were inclined to resolve the purported split among lower courts, this case would be an inappropriate vehicle for doing so.

Second, Petitioners' argument is specious because the lower court conflict they hypothesize is not among Circuits, but between unanimous Courts of Appeal and a handful of District Courts. Again, the Eleventh Circuit assumed *Gustafson's* applicability simply for the sake of argument, without deciding the issue. Since no Court of Appeals has definitively determined whether *Gustafson* applies to claims under Section 11, there is no reason for this Court to intervene.

A. This Case Is Not a Proper Vehicle for Resolving the Question Posed by Petitioners

The Petition's principal flaw is that resolution of the question it attempts to present is irrelevant to the case at bar. *See* Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied"). Far from disputing Petitioners' contention that *Gustafson* applies to Section 11, Respondents' position consistently has been that *Gustafson* confirms their standing in this case because they received stock pursuant to a registration statement and prospectus filed with the SEC to effectuate a public offering. Moreover, the Eleventh Circuit upheld Respondents' standing despite explicitly assuming (without deciding) *Gutafson's* applicability to this case:

> Assuming the validity of the premise underlying Defendants' argument – that even if a plaintiff can trace the shares he acquired to a registration statement, he cannot recover under Section 11 unless the registration statement was required as to him – we find the argument without merit because Plaintiffs did acquire their shares of Premiere pursuant to a public offering.

App. at 7-8 (citing *Gustafson*).

In reaching this result, the Eleventh Circuit invoked the well-established "integration analysis" – a fact-specific, multi-factor test that courts have developed to determine whether multiple offerings should be integrated and treated as one for purposes of the registration requirement of the Securities Act of 1933. *Id.* at 9-10. Applying this analysis,

the Court of Appeals found that "all factors point toward integration," App. at 10, meaning a registration statement was required for defendants' sale of shares to plaintiffs, even though plaintiffs conditionally agreed to vote their shares in favor of the Merger transaction prior to the issuance of the Registration Statement. And since "the liability imposed by § 11 flows from the requirements . . . for the filing and content of registration statements," *Gustafson*, 513 U.S. at 571, the Court of Appeals quite logically concluded that plaintiffs have standing in this case. App. at 7-8 and n.5.

Respondents' only rejoinder to the Eleventh Circuit's entirely reasonable, fact-specific finding is their assertion that the integration analysis never has been applied in the Section 11 context. *Id.* at 10 n.5. No persuasive reasoning or citations are offered to show why such application would be wrong – either generally or on the unique facts of this case. Moreover, since Respondents relegate their conclusory reply to a mere footnote, their argument has effectively been waived. *See, e.g., Lutwin v. Thompson*, 361 F.3d 146, 148 n.1 (2d Cir. 2004) ("We decline to consider this argument because '[a] contention is not sufficiently presented for appeal if it is conclusorily asserted only in a footnote.'" (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001)).[4]

4. *See also United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived.") (citing *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989)); *United States v. Mapp*, 170 F.3d 328, 333 n.8 (2d Cir. 1999) ("The placement of this issue in a footnote (only) leads us to decline to consider Moore's claim here.") (citing *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993)); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir. 1996) ("The summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal.") (collecting cases).

B. There Is No Conflict Among the Courts of Appeals

In a desperate bid to bolster their case for review, Petitioners insist that Supreme Court intervention can be justified to resolve a "division in the lower courts" over the scope of this Court's ruling in *Gustafson*. In fact, as Petitioners' own cited cases demonstrate, the only conflict over the applicability of *Gustafson* to Section 11 claims is one between the several Circuit Courts that have held it does not apply,[5] and a few District Courts (principally from the District of New Jersey) that have held it does.[6] Moreover, the precise "division" between these unanimous Courts of Appeal and the dissenting District Courts is over the standing of purchasers in the aftermarket, who must "trace" their shares to an initial public offering. As Respondents are forced to concede, tracing is "logically inapplicable" to case. App. at 8 n.4.

It should be emphasized again that the Eleventh Circuit assumed the relevance of *Gustafson* simply for the sake of argument. *See* App. at 8 n.5 and n.6. Since *Gustafson's* application supported Respondents' standing, resolution of that issue was not critical to the case, and the Eleventh Circuit

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5. *DeMaria v. Andersen*, 318 F.3d 170, 178 (2d Cir. 2003); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871-72 (5th Cir. 2003); *Lee v. Ernst & Young LLP*, 294 F.3d 969, 977 (8th Cir. 2002); *Joseph v. Wiles*, 223 F.3d 1155, 1159 (10th Cir. 2000); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076 (9th Cir. 1999).

6. *McKowan Lowe & Co. v. Jasmine Ltd.*, 127 F. Supp. 2d 516, 543 (D.N.J. 2000); *Brosius v. Children's Place Retail Stores*, 189 F.R.D. 138, 144 (D.N.J. 1999); *Sturm v. Marriott Marquis Corp.*, 26 F. Supp. 2d 1358, 1370 (N.D. Ga. 1998); *Gannon v. Cont'l Ins. Co.*, 920 F. Supp. 566, 575 (D.N.J. 1996).

reserved final judgment on it for another case. *Id.* As of the filing of this opposition, therefore, Petitioners cannot point to a single Court of Appeals that has held that *Gustafson* applies to Section 11 claims. Accordingly, the question posed by the Petition is not yet ripe and does not merit Supreme Court review at this time.

C. Practical Considerations Favor Denying the Petition

Prudential considerations also counsel against this Court granting the Petition. This Court frequently has denied certiorari in cases for which further proceedings are pending in the lower courts. *See, e.g., American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Fireman & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). As this Court has explained, certiorari jurisdiction is "to be exercised sparingly, . . . [a]nd, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The reasons for this position are obvious: further proceedings in the lower courts may illuminate, or moot, the issues presented by Petitioners, or even bring to light additional certiorari-worthy issues. Judicial efficiency concerns counsel against granting certiorari until the record has been fully developed and all of the questions involved in the case may be considered simultaneously.

The procedural posture of this action makes it particularly likely that further proceedings will yield developments that would substantively affect this Court's review. Once briefing of defendants' renewed summary judgment motion is completed, the District Court will

consider again whether to grant summary judgment on Respondents' claims. If summary judgment is denied, a trial will follow, offering still more opportunities to develop the issues. Those proceedings, or other developments, may moot the Petition entirely. Delaying trial, by contrast, risks prejudicing plaintiff through lost evidence or eroded recollections. *See Clinton v. Jones*, 520 U.S. 681, 707-708 (1997) ("[D]elaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts."). This action was filed in 1998, and has been pending in the Northern District of Georgia since 1999. Such passage of time only exacerbates the risk of prejudice. Practical considerations thus militate against granting the Petition.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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